Exhibit 34

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SONY MUSIC ENTERTAINMENT, et al.,	Civil Action No. 1:18cv950
Plaintiffs,	
vs.	Alexandria, Virginia
	May 17, 2019
COX COMMUNICATIONS, INC., et al.,	10:01 a.m.
Defendants.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOHN F. ANDERSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	SCOTT A. ZEBRAK, ESQ. Oppenheim + Zebrak, LLP 4530 Wisconsin Avenue, N.W. 5th Floor Washington, D.C. 20015
FOR DEFENDANTS COX COMMUNICATIONS, INC.; AND COXCOM, LLC:	THOMAS M. BUCHANAN, ESQ. Winston & Strawn LLP 1700 K Street, N.W. Washington, D.C. 20006-3817
TRANSCRIBER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Third Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

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(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

P R O C E E D I N G S

THE CLERK: Sony Music Entertainment, et al., versus Cox Communications, Inc., et al., Civil Action No. 18cv950.

MR. BUCHANAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. BUCHANAN: Thomas Buchanan on behalf of defendants Cox.

THE COURT: Thank you.

Mr. Zebrak?

MR. ZEBRAK: Good morning, Your Honor.

THE COURT: Thank you.

Well, Mr. Buchanan, I'll hear from you, but I suggest you just focus anything you want to add to your pleadings as to Lessler -- Lesser and Sheckler. I think I'm comfortable with allowing the depositions as to 30(b)(6) as to RIAA and to MarkMonitor, but the two individuals I need to hear a little bit more about.

MR. BUCHANAN: Okay. So Victoria Sheckler, she worked for the RIAA, and during the time period in question, 2012, '13, and '14, she negotiated the notice limit on behalf of the RIAA and the plaintiffs with Cox.

THE COURT: And she did all that as a corporate representative of RIAA?

MR. BUCHANAN: Yeah.

THE COURT: None of that was done in her individual

roles, right?

MR. BUCHANAN: Yes.

THE COURT: And so -- okay.

MR. BUCHANAN: So the, the plaintiffs have pointed out, I think the Court is getting to this point, that they've offered Steve Marks, a corporate representative, to testify to 30(b)(6), so they say he will cover this correspondence.

THE COURT: And that, that was one of the topics that you laid out in the 30(b)(6) notice, the communications and negotiations or whatever having to do with the limit.

MR. BUCHANAN: Yes.

THE COURT: Okay.

MR. BUCHANAN: Yes, Your Honor. But we feel that since the e-mails came from Ms. Sheckler and she, you know, had discussions beyond the e-mails with our personnel and our people, that she would be a better 30(b)(6).

Now, obviously, we can't dictate that, but considering that it wouldn't be that long a deposition, they represent her and RIAA, it would be in D.C. and would be half a day at most, and considering the stakes here, that we're concerned that Mr. Marks, who we've deposed in other cases, you know, he's a good witness, a professional witness, is that we're not going to get the same type of testimony first, he acknowledged, testimony that we would get from Ms. Sheckler.

Considering again that they're suing us for a billion

dollars, we're talking about a witness they represent that would take place at their law firm here in D.C. for a half a day, that that would be a reasonable request of the Court. It's not too much of a burden.

Discovery doesn't end until July 2, and then Ms. Lesser we could do almost the same day or the same time. She's also represented by them. And that would also take place in D.C. We think she's an important witness because of her role with the Center for Copyright Information, which established the copyright alert system, which we think is very important as a comparable to what Cox did in terms of the way it reviewed notices and acted on notice of copyright infringement from the plaintiffs in this case.

THE COURT: Well, obviously, they, they, they don't believe that the Center for Copyright Information has any bearing on this case. I mean, help me understand where you see that really fitting into the issues that are going to be litigated in the trial of this case.

MR. BUCHANAN: Okay. So obviously, we're in discovery at this point --

THE COURT: Right.

MR. BUCHANAN: -- so, as Your Honor knows --

THE COURT: It seems to never end, either, I might add.

MR. BUCHANAN: Right. Well, we're getting there, and

we appreciate the Court continuing it to July 2, but again, this will not be a long deposition, but here's why she's an important witness: So as you know, the essence of the plaintiffs' case is our copyright review --

THE COURT: Right.

MR. BUCHANAN: -- system, that we didn't -- the first notice that came in, we didn't pass it on.

We didn't pass on the next ones, and we had a cap, and it was 600 wasn't enough.

I will point out that now that we've analyzed that information, it turns out they never even exceeded the old cap of 450 during the time period in question but six times, even though we gave them 600, and that goes to, back to Ms. Sheckler. She negotiated that cap.

They're making a big issue of that in their expert depositions and their complaint and in their allegations, when it terms out they never even came close to that. They never adjusted for that.

So where Ms. Lesser is important is she establishes this system called CAS, and what they did, the plaintiffs claim, well, it's not relevant because it wasn't legally required.

Well, we weren't legally required to give them 600 notices or 450 notices on a daily basis. We weren't legally required to terminate after one, two, or three notices, which

they're claiming in their damage theory that we should have terminated after the first notice, just terminated the people completely.

So what we're showing is, look, what is a comparable here? What is reasonable in the industry at the time? So we know what we did. So what did all the other ISPs do in coordination and agreement with the plaintiffs and the RIAA? They did one notice per complainant a week, every seven days. They terminated no one.

So what is the standard here to the jury? There's no statutory requirement that you terminate after a certain amount or that you accept so many notices in a day or over a week. There's no regulation. There's no prior case law. So -- and yet they're saying we should have terminated after one notice 56,000 subscribers.

THE COURT: What, what was Cox's relationship with CAS? I mean --

MR. BUCHANAN: So --

THE COURT: -- my understanding was they were not a part of that.

MR. BUCHANAN: That's right.

THE COURT: Okay.

MR. BUCHANAN: So CAS establishes this graduated response system, which is much more lenient than our CAS system, and so we say we already have a system in place where

we go through this process and people drop off along the way.

I'll add to you, Your Honor, that under our system, 30,000 -- 30 percent, rather, of the people where one notice came in, we've now determined 30 percent never got another notice. In fact, they never got a notice because we never forwarded the first notice.

After the third notice, 75 percent of our subscribers that got notices from RIAA never got another notice. So the system worked. When you got to five, you're up into the 80s.

THE COURT: Well, the system worked if you agree that there can be a cap on the number of notices. I mean, if --

MR. BUCHANAN: Well, we --

THE COURT: But, I mean, that's one of the other issues in this case is if they had thousands of other notices that they couldn't provide you with, that doesn't necessarily mean there wasn't continuing infringement by people who had gotten a single notice. It's just they got cut off in the number game, right?

MR. BUCHANAN: No. Well -- no. So -- well, the way our system worked is when -- the first notice created a ticket, and we didn't forward it, and what the evidence will show and our statistician will show is that, in fact, that was a proper decision business-wise because of those people, 30 percent never got another notice at all. In other words, it was a mistake, the kid did it, they caught it, it's hard to know.

THE COURT: Well, then --

MR. BUCHANAN: So then you get in -- okay. If you're talking about the caps --

THE COURT: The notice, let, let me make sure I understand what you mean by notice, because notice means what Cox received, right?

MR. BUCHANAN: That's right, from the RIAA, from the plaintiffs.

THE COURT: And so the plaintiffs were limited to the number of notices that they could provide to Cox, right?

MR. BUCHANAN: Six hundred a day.

THE COURT: A day, okay. So because they were limited with the number of notices that they could provide to Cox per day, that doesn't mean there wasn't continuing infringement by a customer of yours. It's just you didn't have any notice of it, right?

MR. BUCHANAN: So we've analyzed their notices, and during the time period in question, they, they rarely, if ever, reached the 600 notices. It was only by mistake.

Six times over the two-year period, they exceeded the 450 limit in a day by a couple. That's because even though it was like 7 cents a notice, for some reason, they maintained the old cap. So when you say, well, wait a second, they could have been going to 650, 700, that never happened.

Would it have happened? I don't know. It did not

happen because they never bothered to adjust the system.

And, and so the same 600 cap -- the cap with the other is relevant with CAS because I think it was the same for the five others ISPs. The difference is we allowed one per day per complainant, per subscriber. They under CAS was one a week. Every seven days, you only -- the individual subscriber of the five other ISPs could get one notice a week. So -- and they did not terminate them ever, no termination requirement.

Well, the plaintiffs will say, well, this was just an educational operation, that's all it was, but if you read the agreement, you read their web page, this was a serious attempt by the other ISPs -- Comcast, AT&T, Verizon, Cablevision, Time Warner -- to work with the plaintiffs in this case and their representative, RIAA, and that's where we get into CAS and the CCI, that's why it's relevant, and that's what our experts are going to testify.

Because their experts are saying this is ridiculous. They should have terminated after one or two. They should have had a higher cap. They should have invested more resources, more computers, more people, and they should have terminated more. Yet these same entities negotiated a whole different system which is much more lenient.

So what do you compare it to to the jury? Is there a statute? Is there a jury instruction based on a regulation and some cases? No.

Here's what they did with everybody else. We employed a much more rigorous, tougher system, and I think we should be able to pursue this.

Now, at the end of the day, Judge O'Grady can say no, but in that case, before we tried to get this evidence in in the *BMG* case but because we had not developed it during discovery, we tried to just put an expert up without ever developing the facts, it was denied. It was never found to be not relevant but just never developed to give the plaintiffs in that case an opportunity to, to explore our theory.

THE COURT: Well, I guess you probably need to address if this was such an important part of your defense in this case and was so significant, why is it that it wasn't one of the five that you necessarily would have been able to take without leave of Court? I mean --

MR. BUCHANAN: Well --

THE COURT: You get five nonparty, nonexpert depositions. You've already taken four. We've already talked about my inclination to let you take two more. So that's one over the element already.

MR. BUCHANAN: Right.

THE COURT: So if this person or this entity, but you're going to depose this person in their personal capacities if the entity isn't around anymore, why, oh, and this one a little bit earlier in the game, so to speak?

MR. BUCHANAN: Well, that's a fair point, and, and it's sort of a moving target. So what we tried to negotiate with the plaintiffs is you've read about the Harbor Labs consulting company.

THE COURT: Right.

MR. BUCHANAN: And, and that was, that was beyond difficult. The general counsel of Harbor Labs was telling the two scientists, the doctors, that they were going to violate their NDA if they talked to us. So we had to go back and forth.

And so, you know, that should just be one in our view because they hid the ball -- not the plaintiffs but the Harbor Labs. They were very difficult.

MarkMonitor, we're still litigating to try and depose them. They fought every subpoena for documents. They're fighting our ability to depose people. They say they're in Europe. And it has been extremely difficult.

So they are a key witness in the case. You would think the plaintiffs, who have total access to them, would, you know, not cause them to resist us to the point we can make an argument that if we can't get to them, you shouldn't be able to use them.

And then Audible Magic. They were not identified by the plaintiffs in their initial disclosure. They, they disclosed two entities. They disclosed MarkMonitor and RIAA.

Audible Magic, it turns out, is half of the competition of the technology they used to identify their infringement. They can't prove their case without Audible Magic.

And they told this Court that we should have known about this on February 22, when they provided us with an Excel spreadsheet with thousands of data entries in 11 columns and in the lower case on one of the lower columns, there's this little Audible Magic, you know, as a header, that we were supposed to look at that and figure out we needed to depose Audible Magic.

They can't prove their case without Audible Magic. They should have identified them in their initial disclosures.

So if, if the Court is going to say you're only going to get seven, obviously, we would prefer to do Lesser, then Sheckler. So -- if that's what we have to do. But, you know, it is a big case, and, you know, as you know, this -- the five limit, I think, is something maybe Judge Bryan came up with a long time ago and is something I don't think is a hard limit in every case. I think you come to the Court and you, and you make an argument that in certain cases, the size of the case, the complexity, there should be some leniency there. And these are only half-day depositions, and the stakes are enormous, and we are in discovery.

So, Your Honor --

THE COURT: Okay. Thank you.

MR. BUCHANAN: -- I appreciate your consideration.

THE COURT: Let me hear from you on the Lesser deposition. I think I'm comfortable in ruling on Sheckler without -- I'm comfortable ruling on Sheckler without hearing any more argument from you, but I do want to hear --

MR. ZEBRAK: Okay.

THE COURT: -- argument from you on Lesser, that deposition.

MR. ZEBRAK: Yes, Your Honor. So I won't, I won't focus on Ms. Sheckler or the RIAA, but to begin with, both in their briefing and now in the oral argument, there are just so many flat-out incorrect statements about what our positions are and what's occurred during the course of discovery.

And, you know, to begin with, Cox's counsel just says the plaintiffs at least should not cause MarkMonitor to resist. MarkMonitor's its own third party and --

THE COURT: Well, let's just talk about whether Lesser should be deposed or not.

MR. ZEBRAK: Okay. I just, I just don't want a transcript where things are said and, you know, the implications arise from it.

THE COURT: Okay. You're not admitting any statements that Mr. Buchanan said.

MR. ZEBRAK: Well, okay. Because another court criticized their approach on that in several ways.

So first of all, there's a couple reasons why we've

opposed -- I mean, first of all, we tried to work with Cox and said we're fine to stipulate, with the Court's permission, to one above the limit.

Let me first explain the prejudice to us in the overall landscape of where we stand in the case and sort of what wakes me up at night, which is that currently, there's 31 business days left in discovery as extended, and by my count --

THE COURT: And there are no more.

MR. ZEBRAK: Right.

THE COURT: I've made it clear that, that is --

MR. ZEBRAK: Right.

THE COURT: That's it.

MR. ZEBRAK: Understood that. It was not, it was not a light, a light request from the parties to do that, but within that calendar period already, and this isn't exact because a couple depositions aren't necessarily noticed, by my count, there's 28 depositions left in 31 calendar days, and that includes 9 experts, and expert reports, reply reports still have to happen and pretrial preparation and high school graduations. I mean, there's a lot going on, you know?

And, you know, Mr. Buchanan mentioned Mr. Marks is a professional witness, which he's not. The professional witnesses are the five experts they dropped on us yesterday, with reports about this thick. So there's a lot going on.

And this notion that there's no burden is, is kind of

an empty statement. There is burden. Witnesses need to get ready for a deposition and be deposed, and counsel needs to be involved.

As far as the relevance and why they're looking to Ms. Lesser, two things on that. First of all, we believe that the Court not look at the request in isolation, but in the larger landscape of what still needs to happen in discovery and how they've chosen to use their depositions thus far, but with respect to CCI, which is the entity that Ms. Lesser worked for and which no longer exists, the arguments you just heard highlight why this deposition is inappropriate.

Mr. Buchanan mentioned that the CAS, that Cox wishes to look to as a comparable as to Cox's obligations. It's apples to oranges. It's, in fact, to use another quote I heard somewhere, it's apples to penguins; it's that far off.

The, the CAS was an experiment between certain content holders and ISPs. It was an education project. It by definition did not define the scope of the ISPs' legal obligations.

Mr. Buchanan mentioned that, that the plaintiffs believe CAS is irrelevant because it wasn't legally required. That's not the reason it's irrelevant. The reason it's irrelevant is it was an education program. It explicitly says it's not a statement of your legal obligations under the law.

Whatever obligations they do or don't have to

terminate under the law, that's Cox's obligations. You know, they have the same legal obligations under the law, and that's ultimately what a jury is going to adjudicate liability under.

What Cox wants to do is, is say that's a statement of an ISP's legal obligations, and we're not infringers as a result, and it -- one has nothing to do with the other, and this discovery is, is really all aimed to deflect about their own conduct.

As you heard, they're going to have their experts come in -- and first of all, our experts haven't opined that Cox ought to terminate after one notice. I don't know where this comes from. It, it can't be a justification for a deposition of Jill Lesser.

This is an education program, and what Cox wants to do is make this false comparison to confuse and mislead a jury, and ultimately, I have no doubt this will be the subject of a motion in limine because they've, they've managed to squeak in and spend a lot of their deposition time with others on this, but the notion of now adding in yet another deposition that's wholly irrelevant is, is something that we just think is a bridge too far.

THE COURT: All right. Well, thank you. I appreciate the arguments. I, you know, as I indicated, I think the 30(b)(6) of RIAA and the deposition of MarkMonitor are certainly appropriate. I think given what I've heard here

today and have read in the briefs, I also think allowing Ms. Lesser to be deposed is appropriate.

Sheckler, on the other hand, you know, I think anything that she did she would have done as a corporate representative of RIAA. The 30(b)(6) notice covers those particular topics, and I really don't see there being good cause to extend the number of depositions to allow the person wanting to take the deposition to designate who should be the 30(b)(6) designee, which is, in essence, what they're trying to do.

So I'm going to grant the motion in part. I'm going to allow the RIAA, MarkMonitor, and Lesser depositions but not allow Ms. Sheckler to be deposed, okay?

One other thing. You filed a motion that you noticed for June 7. I don't know, have you-all had a chance to look at that yet -- this is the motion to amend the exhibits to the amended complaint -- yet?

MR. BUCHANAN: Your Honor, I, I do not believe that's going to be an issue, and I think we just haven't had a chance to look at the content.

THE COURT: Okay. The only reason I -- I'm committed to do a program down in Georgetown that morning. If I end up needing to have an argument, which I certainly hope I don't need to do, I'm just alerting you it's either going to be on Thursday afternoon or Friday -- the Thursday afternoon before

or the Friday, late that Friday afternoon. So I just wanted to alert you to that, but hopefully, I won't need to see you in either of those times, okay?

MR. BUCHANAN: I don't think so, thanks.

THE COURT: Okay. Thank you.

MR. ZEBRAK: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE TRANSCRIBER

I certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson